No. 89-112

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1989

MARC L. GOLDSTEIN,
Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the
California Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ASSOCIATION OF BAR DEFENSE COUNSEL IN SUPPORT OF PETITIONER MARC L. GOLDSTEIN

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This motion of the Association of Bar Defense Counsel (ABDC) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for petitioner, which has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondent, the State Bar of California. ABDC is a non-profit California corporation newly formed in the public interest,

comprised of attorneys who represent and defend persons in disciplinary and admission proceedings brought before the State Bar, and involved in matters of broad scope and importance for the betterment of the Bar and the public.

Amicus believes that its litigation experience and knowledge of these disciplinary proceedings will provide an additional viewpoint and insight with respect to the important constitutional issues involved in this case. The California Supreme Court did not set out reasons justifying its failure to accord petitioner a hearing on the issue of the extent of discipline to be imposed, nor for allowing the State Bar to have precluded petitioner from access to relevant exculpatory evidence contained within State Bar files.

The opinion below established a dangerous precedent violative of due process, namely that harsh punishment may be summarily imposed without affording the accused a proper hearing. The right to a fair and impartial hearing is an essential cornerstone of American jurisprudence, especially true in attorney disciplinary proceedings, where the public expects such proceedings to closely conform to standards of due process. In this case, the California Supreme Court imposed the Draconian penalty of stripping petitioner of his license to practice law because it concluded that petitioner did not properly bring to the State Bar's attention its own records and files which were maintained on petitioner. The punishment imposed bore absolutely no relationship to evidence in the file, and was grossly excessive as compared to

punishment imposed on other California attorneys.

Simply stated, the California Supreme Court was not in a position to decide the appropriateness of the ultimate sanction of license revocation, which it did without according petitioner the benefit of a hearing on the issue of discipline, and without discovery on all issues.

For the foregoing reasons, the Association of Bar Defense Counsel requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: August 22, 1989

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of the Association of Bar Defense Counsel.

STATEMENT OF THE CASE

After applying to take the California bar examination on two occasions in 1985, and after successfully passing the bar and gaining admission to the State Bar, petitioner questioned the State Bar's assertion that he had somehow deluded the Bar into allowing him to take the bar examination, and more importantly, had deluded the State Bar into admitting him to practice law.

Petitioner disputed the Bar's contention that he had failed to fully and honestly answer all questions asked of him on the bar applications; especially since the State Bar at all times was in possession of extensive records on petitioner from the 1980 moral character proceedings.

In applying to sit for the bar examinations, petitioner filed the applications in his true name, used his correct address, disclosed his true date of birth and social security number, provided a picture of himself and a complete set of fingerprints, listed three attorneys as character witnesses who each had participated in the prior moral character proceedings, disclosed his having taken the 1979 bar examination (which resulted in the earlier hearings), and discussed the prior moral character hearings with employees in the moral character section of the Bar before being admitted. Despite the fact that petitioner had engaged in the filing of numerous lawsuits in his youth, his record as an attorney was unblemished. He was admitted to the Kansas Bar in 1981, and the California Bar in 1985, and never had a single complaint or allegation of misconduct raised against him. The court below noted in its opinion that "there is no evidence that

petitioner had committed any acts of misconduct since becoming a member of the bar." (47 Cal. 3d 937, at 951). Furthermore, there would have been nothing for petitioner to conceal from the State Bar since they admittedly had all of his records in their possession, both in paper form and in their computer.

The State Bar Examiner filed charges against petitioner and thereafter proposed a settlement[1]. Petitioner refused the offer stating that he had done nothing wrong, to which the State Bar attorney indicated that he would thereafter seek harsh punishment.

The record shows that the person at the State Bar charged with checking on petitioner's 1985 applications knew from his computer screen exactly who petitioner was, based on the unique information he truthfully listed on his applications. The evidence was overwhelming that the State Bar knew petitioner's entire past record from the proceedings which it had convened (in fact, as a matter of law it is conclusively presumed to know its own records). Petitioner could not have anticipated nor foreseen the numerous mistakes which the State Bar claims it made in processing petitioner's applications, a fact which the State Bar conceded. The State Bar also admitted in its brief to the California Supreme Court and in oral argument before the court below that it had been negligent in the handling of petitioner's applications.

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[1] The settlement proposal contained a recital, which if petitioner would accept a one-year probation (during which he would still be allowed to practice), the State Bar would agree in writing that it "had examined the applications of Mr. Goldstein and there are no objections thereto and the State Bar has no further criticism of the application procedure followed by Mr. Goldstein."

In March of 1986, the California Supreme Court ordered the State Bar to conduct an investigation on the issue of "whether [petitioner] had committed misconduct warranting discipline". Due to the wording of the order, neither the State Bar nor petitioner presented any evidence on the issue of the extent of discipline, having decided to reserve those issues for a second hearing. The State Bar and petitioner stipulated that if there was a finding of misconduct, and if the finding was sustained on appeal, *further hearings would be held to determine the appropriate level of discipline, if any.* Essential to petitioner's due process arguments herein is that the referee likewise made no findings or conclusions as to the appropriate discipline, instead recommending that the matter "be re-referred back" for further hearings before the same referee to determine the appropriate punishment.

When the proceedings below were returned to the California Supreme Court, the court ignored the written stipulation, and for some reason which is not stated in the opinion, did not refer the matter back for further administrative proceedings, but rather imposed the harshest sanction available against petitioner -- without affording him a hearing that he and the State Bar Examiner had agreed to, and to which he had a fundamental constitutional right to receive.

The court below concluded that petitioner failed to bring to the attention of the State Bar the facts contained in their own records and files, and that he had applied months too early to sit for the bar, and thereby was able to improperly secure admission to the Bar. Kafkaesque? Yes! Unconstitutional? Yes!

Even conceding the accuracy of the finding of facts, petitioner was nevertheless entitled to due process of law which, at a minimum, required the right to a hearing, before any discipline was imposed. The sanction of license revocation was, in and of itself, unduly harsh in comparison to treatment accorded to other attorneys subjected to discipline, and should not have been imposed absent a full hearing.

I
SUMMARILY REVOKING A LICENSE TO PRACTICE LAW WITHOUT AFFORDING AN OPPORTUNITY TO BE HEARD IS OFFENSIVE TO THE CONSTITUTION AND HAS NATIONWIDE IMPLICATIONS TO OUR LEGAL SYSTEM.

A person's license to practice law is a valuable property right, and something which should be taken away only when justice and protection of the public requires -- and then only in strict conformity with notions of Due Process and Equal Protection. *In Re Ruffalo*, 390 U.S. 551 (1968). This Court has consistently held that due process must be accorded in the field of professional licensing, even to persons who are merely attempting to obtain licensure to the state bar. *Willner v. Committee on Character and Fitness* 373 U.S. 96, 102-05 (1963). Attorney disciplinary proceedings are "adversary proceedings of a quasi-criminal nature" where procedural due process must be afforded. *In Re Ruffalo*, *supra*, 390 U.S. 551.

A dangerous precedent is established when the highest court of a state summarily cancels a professional license, without according the accused a hearing mandated by the

Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the petition for certiorari pointed out, this is analogous to a court dispensing with the entire penalty phase of a trial upon a finding of guilt against the accused. Once there was a finding of misconduct, the court below dispensed with the requisite formality of a hearing as to the appropriate sanction to be imposed, and summarily imposed the ultimate punishment which was wholly disproportionate to any evidence in the record.

This was especially true in this case given the finding by the court below that there is *"no evidence in the record that petitioner has committed any misconduct since becoming a member of the bar."* (47 Cal.3d 937, 951.) In virtually every other disciplinary case, an attorney accused of wrongdoing is entitled to the due process guarantee of a hearing, and is entitled to bring forth witnesses and evidence on his behalf bearing on the appropriateness of discipline. Regrettably, petitioner was given no such opportunity here.

The fact that petitioner was vigorously prosecuted after rejecting the State Bar examiner's settlement offer (due to his refusal to admit wrongdoing) suggests that the prosecution of this case by the State Bar may not have been entirely impartial.

The State Bar initially claimed that petitioner was admitted to the Bar due to negligence of its own staff; but later alleged that petitioner had mislead the Bar by failing to disclose to the Bar his involvement in its own moral character proceedings. In defending himself against these charges, petitioner took the position that he did nothing wrong, and

that the Bar at all times knew who he was and was not at all mislead by him. Furthermore, petitioner asserted that there was no way he could have known or anticipated the numerous errors that would have been committed by the State Bar. The Bar's own conduct was therefore directly in issue, suggesting the need for a neutral and detached special prosecutor rather than having this case prosecuted by a person who was personally involved, who had given testimony in the proceeding, and who was responsible for overseeing the admittedly negligent staff of the State Bar. See *Pickering v. Board of Education*, 391 U.S. 563, at 578 (1968).

Recently this Court reversed an attorney's six month suspension from practice, summarily imposed by a judge, when the attorney refused to apologize for a letter he had written to the court. *In the Matter of Attorney Robert J. Snyder,* 472 U.S. 634 (1985). Amicus strongly urges the granting of certiorari in this case based on many of the same factors presented here.

The thrust of the State Bar's case was that the application forms which petitioner completed reasonably called for disclosure of the prior moral character proceedings. The court below concluded that petitioner committed misconduct by failing to make such disclosures, however it did so concluding that the negligence of the State Bar was irrelevant. This holding deprived petitioner of his license without due process.

Petitioner had absolutely no notice that he could be punished, let alone lose the license to practice law he had waited

years to receive, just for failing to disclose something fully known to the State Bar, which was not asked of him on the applications he was sent.[2] A person intending to conceal facts from the State Bar would not have gone about it by providing accurate information to the same entity that was very familiar with him, maintained computer files on every applicant, and was in possession of hearing transcripts and extensive documentary evidence on petitioner. Petitioner did not have to conceal anything from the State Bar since they not only knew everything about him, but there was no new adverse information about him which, if discovered by the Bar, might have prevented him from admission.

Amicus has been unable to find a single case where an attorney had his license revoked for failing to disclose matters on a bar application which were previously disclosed, and which were admittedly in the possession of the State Bar at all times. The facts of the instant case are dramatically different from those in *Langert v. State Bar*, 43 Cal.2d 636 (1954), cited by the court below in its opinion in *Goldstein v. State Bar*, 47 Cal.3d 937 (1989), yet the outcome in both was identical. Langert had failed to list on his California bar application the fact that he was a member of a bar of another state, that a disbarment recommendation in that state was pending along with five other disciplinary proceedings, he provided false former addresses, all in an effort to prevent discovery by the California Bar of adverse facts which would have prevented Langert from admission.

In the case at bar, there was nothing that petitioner was

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[2] The application form was rewritten in 1986 to include such a question, for the first time, following petitioner's admission to the Bar.

trying to keep the State Bar from "discovering" about him, since they concede that they knew everything about him and had everything in their files; accordingly due process and equal protection mandate that petitioner not be penalized by forfeiture of his license for complying with the instructions on the applications sent to him by the State Bar directing him to list only new incidents.

The absence of "any evidence . . . of misconduct since becoming a member of the bar" would certainly have been a factor in mitigation at a hearing to determine the appropriate sanction, yet no such hearing was afforded in this case.

II
DUE PROCESS REQUIRES THAT PERSONS ACCUSED OF WRONGDOING BE ALLOWED ACCESS TO EXCULPATORY EVIDENCE IN THE POSSESSION OF THE PROSECUTOR.

The court below, in a departure from well-established precedent rooted in the Constitution, approved of the State Bar's withholding of relevant and exculpatory evidence from petitioner under a assortment of claimed evidentiary privileges. These included claims of work product, attorney/client, and most importantly, the official information privileges. The items withheld included such basic evidence as witness statements, a 27 page report to the Committee of Bar Examiners dealing with the State Bar's findings and conclusions about how petitioner was admitted to the Bar, handwritten notes of telephone conversations which petitioner had with the State Bar's staff prior to his admission, etc. The court below found that petitioner had failed to show

how he was prejudiced -- shifting the burden of proof in total contravention of well-settled law which compels either dismissal or a preclusion or limiting order where the prosecuting agency asserts the official information privilege. See, for example, *In Re Ricky B.*, 82 Cal.App.3d 106 (1978); *Shepherd v. Superior Court*, 17 Cal.3d 107 (1976); *Dell M. v. Superior Court*, 70 Cal.App.3d 782 (1977); *People v. Ansbro*, 153 Cal.App.3d 273 (1984). *California Evidence Code* Section 1042, applicable to criminal cases, states that upon assertion of a claim or privilege by a governmental agency, "the presiding officer *shall make an order* or finding of fact adverse to the public entity. . . " The words of the statute are mandatory, not permissive.

The United States Supreme Court considered this issue in *United States v. Reynolds* 345 U.S. 1 (1953), and held:

> "[S]ince the government which prosecutes an accused also has the duty to see that justice is done, *it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.*"
>
> (*emphasis added.*)

The evidence withheld from petitioner by the State Bar prosecutors was crucially relevant, especially since the Bar's case turned in large part on its claim that petitioner had mislead the Bar into admitting him by concealing his involvement in the earlier moral character hearings. If petitioner was able to prove that he had made adequate disclosures verbally to the State Bar staff, or that the State Bar was fully aware of petitioner's records, then those factors would

strongly militate against a finding of misconduct, or at least, would be substantial factors in mitigation in any penalty to be determined.

The ruling in the case below has a far-reaching impact not only on attorneys in California, but to persons involved in any administrative or licensure disciplinary proceedings as well as the public in general. The fundamental right to a fair trial, to confront and cross-examine witnesses and evidence, to be able to call witnesses and compel evidence in one's own defense, is undermined by the decision below, especially important in those cases deal with one's right to pursue one's livelihood. *In Re Murchison*, 349 U.S. 133, 136 (1955). The potential impact and scope of the decision of the court below, therefore applies to administrative agencies as well as to the courts. *Gibson v. Berryhill* 411 U.S. 564, 579 (1973).

In the case at bar, petitioner was permitted to confront and utilize only that evidence which the State Bar released to him; resulting in the State Bar controlling not only the charges and conduct of the trial, but also controlling and limiting the manner in which petitioner could prepare and provide for a defense to the charges of misconduct.

III
THE SANCTION OF LICENSE REVOCATION WAS UNDULY HARSH UNDER THE CIRCUMSTANCES.

The California Supreme Court was not in a position to independently evaluate the record below, because there was

no record made on the subject of discipline. Petitioner was never given an opportunity to present evidence and argue the issue of sanctions since the court below did not refer the matter for a penalty hearing, despite the written stipulation entered into between the State Bar and petitioner.

Assuming *arguendo* that the finding of misconduct was fully warranted, the punishment imposed was unduly harsh. Petitioner had overcome his youthful shortcomings of 10-15 years earlier and had subsequently established an excellent record of conduct and good moral character, and was eager and intent on becoming a lawyer. Although he had passed the Bar in 1979, he was forced to wait for nearly six years, resulting in his having to again pass the bar in 1985.[3] He wrote asking for permission to take the Bar, which he reasonably and justifiably believed had been granted. He had received an application; which the Bar accepted; and then allowed him to take the Bar. After his first unsuccessful attempt in February, 1985, he again applied and was allowed to retake it in July, 1985, and was admitted in December 1985, some six and a half years after first passing the California Bar.

The punishment imposed upon petitioner was clearly excessive when compared with the other cases in which the State Bar has sought license revocation. When the court below asked the State Bar to conduct an investigation in the case at bar, it cited as authority the case of *Stratmore v. State*

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[3] The State Bar has again required petitioner to pass the bar examination an unprecedented third time in 1989, even though he has already passed it twice in 1979 and in 1985. Petitioner was allowed to take the July, 1989 bar examination and is now awaiting results.

Bar, 14 Cal.3d 887 (1975), in which a nine-month suspension was imposed due to pre-admission misconduct which consisted of having defrauded nearly a dozen lawfirms. There is no question that such misconduct is much more egregrious than that found in the case at bar, yet the discipline imposed in *Stratmore* was dramatically less.

No sanction was imposed in other California revocation proceedings where the attorneys had failed to disclose information *specifically called for* on the bar application. In one case, an applicant had deliberately concealed the fact that he had testified falsely under oath *March v. Committee of Bar Examiners*, 67 Cal.2d 718 (1967). In another case, an applicant had concealed the fact that he had been a party to an out-of-state disbarment proceeding *In Re Rollinson*, 213 Cal. 36 (1931). A disbarred attorney was granted reinstatement even though he had concealed on his bar application a judgment for fraud against him, brought by his insurance company, on the grounds that he had falsified his application for insurance. *Calaway v. State Bar,* 41 Cal.3d 743 (1986). The California Supreme Court specifically reasoned that since the State Bar could have discovered the fraud judgment, Calaway's "assumption was not unreasonable that the bar would review the entire file if it deemed the matter significant." *Calaway, supra,* 41 Cal.3d at 748.

The California Supreme Court has summarily dismissed three other petitions brought by the State Bar seeking to revoke licenses to practice law (See California Supreme Court Bar Misc. Nos. 4128 and 4024) based on the Bar's claim that it had been negligent in admitting: (a) a former New York judge who had been recently disbarred, (b) and

applicant who had failed the Professional Responsibility Examination, and (c) an applicant who had never taken the Professional Responsibility Examination.

Petitioner did not steal money from a client, engage in contemptuous acts, or otherwise commit a heinous act of dishonesty, yet attorneys who have engaged in such conduct have received much less punishment than that imposed on petitioner. In the recent case of *In Re Mostman*, 47 Cal.3d 725 (1989), an attorney who solicited the murder of a former client received a five-year probation, with only two years' actual suspension -- despite the fact that he had been disciplined twice before.

An attorney who was convicted of possession of LSD for sale received a one year actual suspension and five years' probation. *In Re Nadrich*, 44 Cal.3d 271 (1988). An attorney who was convicted of illegal possession of marijuana and conspiracy to distribute received no actual suspension and was placed on probation for three years. *In Re Kreamer*, 14 Cal.3d 524 (1975).

An attorney who committed multiple acts of willful misconduct, abandoning clients to their prejudice, obtaining substantial loans under unfair terms and pursuant to misrepresentations, and ultimately losing the money without making any repayment was placed on five years' probation with eighteen months actual suspension. *Frazer v. State Bar*, 43 Cal.3d 564 (1987).

In the case of *State Bar v. Boehme*, 47 Cal.3d 448 (1988), an attorney was suspended for eighteen months for having misappropriated client trust funds, for failing to make restitu-

tion, and for having fabricated and misrepresented facts to the Review Department of the State Bar Court during the disciplinary case. An attorney who wilfully disobeyed important court orders and attempted to deliberately mislead a judicial officer, and who lied on several occasions during his disciplinary proceedings was placed on five years' probation with only one year actual suspension. *Maltaman v. State Bar* 43 Cal.3d 924 (1987).

The court below has repeatedly expressed the view that the primary purpose of discipline is the protection of the public, the profession, and the courts rather than the punishment of the attorney. *In Re Severo,* 41 Cal.3d 493, 500 (1986). Yet, in the case at bar, the court has expressly held that there was no evidence that petitioner committed *any acts of misconduct* as a member of the bar, suggesting that the public need not be "protected" from petitioner. It is uncontroverted that none of petitioner's alleged acts of misconduct even begin to rise to the level of these recent cases, yet the sanction that petitioner received was much more severe than any of them. The fact that the State Bar examiner had proposed a one year probation with no actual suspension in settlement of this case indicates that even the State Bar prosecutor did not see the instant case as one calling for the imposition of the ultimate sanction.

CONCLUSION

Amicus believe that the ruling of the California Supreme Court was clearly erroneous and poses a serious threat to the integrity of the attorney disciplinary system, which in this case, denied an officer of the court the fundamental right to a hearing guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The ramifications of the decision below have nationwide application, because it is not confined to the context of attorneys, but affects the disciplinary process for all professions in all states.

Beyond the threshold question of the right to a hearing, there is very compelling evidence in the record below that petitioner's license revocation was excessive and wholly disproportionate to any acts of misconduct by petitioner.

For the foregoing reasons, amicus respectfully requests that this Honorable Court issue its writ of certiorari to the California Supreme Court in the matter of *Goldstein v. State Bar of California.*

DATED: August 22, 1989

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